No. 82-957

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

DOUBLEDAY SPORTS, INC.,
Petitioner,

v.

EASTERN MICROWAVE, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. Recent legislative developments confirm that the issue presented by Doubleday Sports' petition for certiorari is important. Those developments also underscore the significant error made by the court of appeals.

In H.R. 5949, a bill originating in the House of Representatives at the last session of Congress, partisans of Eastern Microwave, the respondent here, unsuccessfully sought legislation that, among other things, would have overturned the decision of the district court below, which was favorable to

Doubleday Sports. The bill died in the Senate in December 1982. In commenting on the legislation, Senator Mathias, a sponsor of the Copyright Revision Act of 1976, said:

> "Any proposal to exempt resale carriers from liability raises serious questions of copyright policy—issues which the substantive Senate committees simply were unable to address in this Congress. Section 101a [of H.R. 5949] is seemingly inconsistent with the principle of the copyright law, which provides generally that each separate use of a copyright product—including a sports owner's televised transmissions of its games—requires compensation to the copyright owner. *The 1976 act included a very narrow exception to this liability for a traditional 'passive' common carrier, such as AT&T, which merely acts as a conduit between the sender and receiver of a signal. The amendment would change the present law to exempt a whole new group of resale carriers.*
>
> . . .
>
> "*This amendment would be a major change in the present copyright law and represents a sharp departure from prior policy. . . .*
>
> "Certainly, any statute dealing with such a fluid and dynamic field as cable television requires review from time to time, and it is possible that the Congress could be convinced that there is some public benefit in eliminating copyright liability for resale carriers which are not now exempted by the 1976 act. *However, this is such a significant reversal both of policy and of the law's explicit provisions that any change should be made thoughtfully and only after the most persuasive hearing.*" 128 Cong. Rec. S. 16006 (Dec. 21, 1982) (daily ed.) (emphasis supplied).

2. EMI's brief in opposition confirms that the court below improperly substituted its conception of a satisfactory copyright regime for the statute enacted by Congress. If, as EMI and the court of appeals would have it, Congress intended to immunize

from copyright liability any intermediate carrier of off-the-air television signals to cable systems, Congress easily could have done so. It did not. Instead, in Section 111(a)(3) of the Copyright Revision Act, Congress adopted language that limits, as plainly as words will allow, such immunity to certain carefully defined intermediate carriers. In the words of the statute, these carriers must have "no direct or indirect control" over "the content or selection" of the signals retransmitted, nor over the "particular recipients" of the retransmissions; and the activities of such carriers with respect to their retransmissions must "consist solely of providing wires, cables, or other communications channels" for others.

Contrary to EMI's contention, the interpretation of the Copyright Act urged by Doubleday Sports does not leave cable systems in a void. Cable systems remain free under the Act, subject to the compulsory license scheme, to order truly passive intermediate carriers to retransmit signals selected by the cable systems for viewing by the systems' customers. Carriers responding to such orders can satisfy the tests prescribed by Section 111(a)(3) for exemption from copyright liability. But EMI's activities—especially its selection of the WOR-TV signal for satellite retransmission, and its aggressive marketing of that signal to potential customers around the country—plainly disqualify it from claiming the exemption.

3. The court of appeals acknowledged that EMI makes a "type of selection" (App. 11a). EMI's best answer to the contention that its selection is precisely the one proscribed by the Act is that the statutory language is unclear (Br. Opp. 5). But the word "selection" is not ambiguous. Plainly, EMI "selects" the WOR-TV signal when it exercises its marketing judgment on the basis of the substantive content of the signal chosen, and offers it to cable systems around the country.

Those "cable systems are granted a compulsory license to retransmit television programming to cable subscribers" (Br. Opp. 2). But EMI is not a cable system. It has no compulsory license. It cannot shelter itself under the compulsory license regime. That Congress granted cable systems such a license does not entitle entrepreneurs like EMI to interject themselves

with impunity between conventional television stations on the one hand and cable systems on the other. EMI has no statutory license to expropriate the off-the-air signal of WOR-TV for promotion and marketing to hundreds of cable systems all over the country, without seeking leave of the copyright holders of WOR's programming and without compensating those holders for the commercial use of their property.

4. Having conceded, in effect, that the language of Section 111(a)(3) does not support the court of appeals' holding, and further conceding that "the use of legislative history to illuminate the meaning of Section 111(a)(3) is necessary" (Br. Opp. 6), EMI underscores the error below by asserting erroneously that the court of appeals "carefully analyzed the legislative history . . . of the Act" (*id.* at 3). The court did no such thing. Its opinion is critically deficient in this respect.[1]

The court's silence is understandable in two respects. *First,* the legislative history of Section 111(a)(3) discloses that Congress modified the copyright revision bill at the behest of the telephone company, in order to preclude any potential liability under the new law to that entity as an intermediate carrier of long-lines terrestrial retransmissions to cable system customers. The relevant legislative materials are collected in the petition for certiorari at 9-10.

Second, the legislative history also discloses that when Congress used the word "selection," it had in mind precisely the kind of activity at issue here, albeit by cable systems (Pet. Br. 9-10). That cable systems took the retransmitted signals entire and without edits made no difference; the selection of broadcast signals engaged in by cable systems would have disqualified them from the exemption. Accordingly, cable systems need the compulsory license in order not to be subject to full copyright liability. EMI has no such license.

5. EMI also bemoans the difficulty that cable systems

[1] The sole reference to the legislative history in the opinion below occurs in conjunction with the court's discussion of the "public performance" issue—a different question from the one presented here, and one that the court of appeals did not reach in light of its disposition of EMI's appeal (App. 14a n.16).

supposedly would encounter if required to negotiate directly with copyright holders (Br. Opp. 2). Senator Mathias disposed of this point in his December 1982 statement:

> "One of the major justifications for this amendment is the claim that it is essential to preserve the compulsory license for cable systems set forth in section 111 of the act. *However, both the administration and the Copyright Office disagree.*
>
> "The Register of Copyrights pointed out in testimony in 1979 that even if local cable systems might not be able to negotiate individually with program rights holders, *satellite resale carriers are in position to act as a 'central agent in obtaining retransmission rights and to relay programming.'* The National Telecommunications and Information Administration of the Department of Commerce also concurs." 128 Cong. Rec. S. 16006 (Dec. 21, 1982) (daily ed.) (emphasis supplied).

6. Finally, the briefs *amici* submitted by Columbia Broadcasting System, Inc. and the Motion Picture Association of America confirm that the question presented by Doubleday Sports' petition for certiorari is important to the administration of the Copyright Act. The decision below implicates the interests of copyright holders and conventional broadcasters throughout the country. If the decision is left intact, entrepreneurs like EMI will have the legal authority to retransmit copyrighted material to cable systems nationwide without liability of any kind under the copyright scheme. The court of appeals' wholesale immunization of such commercial exploitation will deprive copyright holders of control over their product. With the increase of satellite retransmission facilities and the proliferation of exploiters like EMI, the commercial losses suffered by copyright holders will multiply.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari and the briefs *amici*, petitioner, Doubleday Sports, Inc., respectfully submits that the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rules 19.3 and 28.5 of the Rules of the Supreme Court of the United States, I hereby certify that three copies of the foregoing Reply Brief For Petitioner were mailed via First Class, United States Mail, postage prepaid to the following counsel on this 20th day of January, 1983.

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